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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946

No. 953

THE SANITARY DISTRICT OF CHICAGO,
Petitioner,

vs.

ACTIVATED SLUDGE, INC., ACTIVATED SLUDGE, LTD., EDGAR C. GUTHARD, CARL W. JOHNSON, ALBIN C. AHLBERG, ARTHUR D. BRADBURY, CLIFFORD C. BRADBURY, CLIFFORD C. BRADBURY as Assignee of DOROTHY F. BRADBURY, Deceased, WILBURN F. BRADBURY, EVA B. CAMP, CLAIRE M. FAIRBANKS as Assignee of ARTHUR B. FAIRBANKS, Deceased, SAMUEL B. FLAEGER, FRANCES F. JOHNSON, NINA JOHNSON, ALBERT G. McCALEB, RUTH F. McCALEB, FRANKLIN MAYO, GERTRUDE A. REINKE, PATRICIA M. WILLIAMS and LYNN A. WILLIAMS, JR.,
Respondents.

MOTION AND PETITION FOR REHEARING.

ERNST BUEHLER,
EDMUND D. ADCOCK,
RALPH M. SNYDER,
ELI E. FINK,
Attorneys for Petitioner.

CHAMPLIN-SHEALY COMPANY, CHICAGO 868

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Respondents.

MOTION AND PETITION FOR REHEARING.

Now comes petitioner, The Sanitary District of Chicago, by Ernst Buehler, Edmund D. Adcock, Ralph M. Snyder and Eli E. Fink, its duly authorized attorneys herein, and represents as follows:

1. On March 10, 1947 this Court denied the petition for writ of certiorari which was filed by petitioner on January 27, 1947 to review the judgment of the Seventh Circuit Court of Appeals affirming the judgment of the District Court in the above entitled cause.

2. On April 2, 1947 petitioner filed a petition for rehearing, for reasons deemed good and sufficient unto petitioner and fully stated in said petition for rehearing, to review, vacate and set aside the order entered by this Court on March 10, 1947 denying said petition for writ of certiorari and to reconsider and grant the prayer contained in said petition for writ of certiorari. On April 7, 1947 this Court denied said petition for rehearing.

3. On April 5, 1947, while the petition for rehearing was pending in this Court, Respondents' Brief in Opposition to Petition for Rehearing was served upon petitioner's counsel, although it was received in Washington too late to be filed. Respondents' brief removes certain important matters out of the realm of controverted issues into admissions which if considered by this Court would have an important, if not controlling, bearing on the granting of the petition for writ of certiorari.

4. The interpretation and application of the recovery statute by the courts below is contrary to the Acts of Congress and would introduce arbitrary and speculative awards not grounded on facts or law.

5. The prostitution of the courts by a heretofore successful campaign of suppression of hidden documents of title, false testimony and false pleadings, and the holding of the courts below that this Court's previous pronouncements apply only to misrepresentation in the Patent Office and not in the courts, call for the supervisory power of this Court.

Wherefore, petitioner prays that it be granted leave to file its petition for rehearing, a copy of which is attached hereto.

ERNST BUEHLER,
EDMUND D. ADCOCK,
RALPH M. SNYDER,
ELI E. FINK,
Attorneys for Petitioner, The Sanitary District of Chicago.

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Respondents.

PETITION FOR REHEARING.

On March 10, 1947, this Court denied our petition for writ of certiorari (filed January 27, 1947) to review the judgment of the Seventh Circuit Court of Appeals affirming the judgment of the District Court against the petitioner for general damages in the sum of $950,000 for infringement of apparatus and process patents relating to the purification of sewage.

On April 2, 1947, for the reasons therein stated, we filed a petition for rehearing, which was denied on April 7, 1947. After our petition for rehearing was denied, respondents sent to the Clerk's office a Brief in Opposition to Petition for Rehearing which was not filed and could not have been considered by the Court in connection with our petition for rehearing. Inasmuch as respondents' brief contains a number of significant admissions and statements, made for the first time, the issues involved have become clarified and it becomes manifest that there are present sufficient grounds to justify the issuance of the writ prayed for.

The tradition of this Court has been, in situations where the manifest heavy duties and responsibilities of the Court conflict with the necessity of exercising the supervisory powers of the Court, to throw its weight in favor of ultimate justice, although sometimes persistence and seemingly over-persistence have been required by counsel. Former Chief Justice Hughes has alluded to an early case in which it was necessary for counsel to file a second petition for rehearing which was favorably acted upon.*

* "The Supreme Court of the United States" pp. 72-73:

"I may mention one interesting incident which the published reports of the court fail to show. I refer to *American Emigrant Company* v. *County of Adams*. The case was argued at the end of November, 1878, and the decision was announced in the middle of the following December. Counsel for appellant filed a petition for rehearing which was denied. Being unconvinced, the appellant retained General Benjamin F. Butler who went into open Court and asked for permission to file a second petition, stating that he was sure that the Court had inadvertently fallen into error and that he was confident that if the Court would take the time to read his petition they would thank him for calling the matter to their attention. Before this, to ask twice for a rehearing was unheard of and it is said that the Court was quick to show its disapproval of the innovation and severe in its criticism of General Butler. But, feeling sure of the justice of his cause, and with his accustomed audacity, he stood his ground, with the result that the minutes of April 14, 1879, show this entry: 'On motion of Mr. B. F. Butler it is ordered that the mandate be withheld in this case for the present.' The Court then considered the second petition for rehearing and on April 21, 1879, a rehearing was ordered. The case was reargued in the following October and in November the former decision was unanimously reversed."

There are many cases in which the court did not act favorably until after a second petition for rehearing had been filed.**

Because the client in this case, the taxpayers, cannot be directly consulted, a heavier duty falls upon counsel for petitioner to obtain reversal of an untenable judgment. Its attorneys are charged with a high degree of responsibility to overcome an improper and unlawful decree, especially in this court of last resort which seeks to maintain the dignity of the law.

The public as such never deliberately infringed and should not be mulcted in unproved damages, fantastic in amount and in methods of determining the amount. Its attorneys are therefore charged with a high degree of responsibility to resist an unlawful and improper award.

POINT I.

This cause coming on to be heard on the accounting to determine damages in the nature of a reasonable royalty to be fixed by the Court for the infringing use of the patents in suit, and plaintiffs having stipulated that they neither sold nor installed any treatment plants and had thereby suffered no damages because of lost sales and that they do not seek to recover any monetary sums as profits, and plaintiffs having adduced no testimony as to what a reasonable royalty would be except the general utility and novelty of the patents, the Court, without finding a reasonable royalty, adopts a lump sum to comprise the undetermined reasonable royalty plus extra and elusive damages which likewise cannot be measured or determined.

** For example see:
Schriber, Schroth Co. v. *Cleveland Trust Co.*, 305 U. S. 47.
Kellogg Co. v. *National Biscuit Co.*, 305 U. S. 674.
Zapp v. *U. S.*, Case No. 489, Oct. Term 1945, 91 L. Ed. 688.

> It is thereupon Ordered, Adjudged and Decreed that the plaintiffs recover the sum of $950,000.00 as such damages.

If the judgment in the instant case be allowed to stand on the kind of record now before this Court, the foregoing is the kind of decree which may be expected in the future in similar cases. The Acts of Congress in allowing recovery by way of reasonable royalty, the safeguards adopted by the courts requiring definite proof as to damages, the landmark decisions that a reasonable royalty must be determined as of the start of the infringement and constitutes what reasonable persons would be willing to pay for the use of the patents, the undisputed evidence that respondents themselves placed a contemporaneous value on a license to petitioner at not more than $90,000, the uncontroverted testimony of experts that the reasonable royalty should be approximately $50,000—all of these are swept away and in their stead is introduced chaos, confusion and arbitrary guesses as to what the award should be.

Ever since the District Court, in its opinion, stated that it allowed "extra damages", in an unstated amount, as part of the judgment, we have been endeavoring to elicit from respondents their interpretation of this newfangled notion. Respondents did not ask the District Court to allow "extra damages" as part of the compensatory damages and they have sedulously avoided clarification of the District Court's allowance of "extra damages". Goaded by our persistent efforts, respondents have at last admitted in their Brief in Opposition to Petition for Rehearing that when the District Court allowed a reasonable sum as general damages, it could not allow more than a reasonable royalty.* Respondents further admit that the

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* Respondents' Brief in Opposition to Petition for Rehearing (p. 7):
"We have consistently urged that a 'reasonable royalty' and a 'reasonable sum as general damages' are one and the same thing * * *."

District Court did not allow exemplary damages under the statute but only compensatory damages.* The judgment must therefore be for a reasonable royalty only.

Respondents do not deny that a reasonable royalty consists of the *license fee* which the parties, acting reasonably and without duress and mutually desirous of entering into a license agreement, would have agreed upon *at the commencement of the infringement* as a fair and reasonable charge for a license under the patents in question.**

In the first portion of its opinion (R. I, 52-68), the District Court considered some of the factors which, under the authorities, should be considered in determining a reasonable royalty, such as character of the inventions, their utility, novelty, etc.

Then, without determining the amount of the reasonable royalty, the District Court proceeded at the end of its opinion to allow "extra damages" and said that the "extra damages" include (R. I, 69-70) "damages purely compensatory which are elusive but which plaintiffs ought to recover * * *" and further considered (R. I, 70)

> "the fact that the plaintiffs have been compelled to sustain long and expensive litigation"

and probably compound interest (R. I, 64-5).

Obviously, there was no room for the allowance of so-called "extra damages" in addition to a reasonable

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* Respondents' Brief in Opposition to Petition for Rehearing (p. 6):
"The fact is, that the District Court very clearly and specifically stated (Rec. I, p. 70) that it 'carefully avoided any allowance in the nature of exemplary damages' and that the judgment included 'only compensatory damages.'"

** A reasonable royalty is so defined in:
Egry Register Co. v. *Standard Register Co.*, 23 F. (2d) 438 (C.C.A. 6, 1928).
Enterprise Mfg. Co. v. *Shakespeare Co.*, 47 F. Supp. 859 (D.C. Mich., 1942).
Horvath v. *McCord Radiator & Mfg. Co.*, 100 F. (2d) 326 (C.C.A. 6, 1938).

royalty. By admitting that recovery under the statute of a "reasonable sum as general damages" permits recovery of no more than a reasonable royalty, respondents must concede that there is no precedent in the authorities or justification in principle for the District Court's allowance of "extra damages" as part of a reasonable sum as general damages.

These very recent admissions by respondents confirm our claims as set forth in the petition for certiorari (Point II A, pp. 38-43) and petition for rehearing (Point II, pp. 12-20).

It was not necessary for the trial court to speculate on remote or "elusive" damages which are so remote that they could not be accurately described or measured in dollars or any other kind of judicial appraisement, because the record showed that at the time involved respondents had offered to other municipalities a license quite in keeping with the opinion of the highly qualified experts that a reasonable royalty would be $50,000 for the infringing period. The judgment of $950,000 is just nineteen times the proper amount, and is as remote and speculative as is the new theory of extra damages used by the courts below.

The decisions below have grafted into law, diametrically opposed to the authorities which have construed the Patent Act for many decades, a vicious principle that there may be included in compensatory damages a mysterious amount labeled "extra damages". The confusion created in the federal law by the false interpretation of the Patent Act (Sec. 4921) by the courts below should be corrected. Because the lower courts failed to correctly interpret this statute this Court reversed and remanded in the cases of *Westinghouse* v. *Wagner*, 225 U. S. 604; *Dowagiac Mfg. Co.* v. *Minnesota Moline Plow Co.*, 235 U. S. 641.

POINT II.

In their Brief in Opposition to Petition for Rehearing, respondents reiterate that this is an ordinary patent case and that the patents have expired. The points raised in our petition for rehearing and urged in this petition do not relate to any questions of validity or infringement of the patents in suit, but to important legal propositions of general application.

In their answer to our first point, respondents refuse to argue the merits and base their entire argument upon the fact that the courts below have decided against us. We would not be presenting our petition if the lower court had decided otherwise.

The significant statement in respondents' brief appears at page 4 where, in attempting to answer our charge that we have not had an opportunity to prove the allegations set forth in our petition to vacate the interlocutory decree on account of the sordid conduct of respondents, respondents state as a fact:

> "The fact is, that the District Court did hear voluminous evidence bearing upon the allegations of the petition of 1940 and that based on such evidence, it was able to contradict or explain every factual allegation as set forth in said petition."

The nub of our complaint relates to the irregularities in the proceedings below under which respondents were permitted to file certain documents and affidavits which were treated as evidence by the courts below and used by the courts to deny us leave to file said petition to vacate the interlocutory decree without giving us any opportunity to introduce testimony to support the allegations in our peti-

tion and to falsify and disprove the affidavits and allegations of respondents and to confront respondents' officers with definite admissions made in the *Dilling* case that they had testified falsely in this case.

Inasmuch as the petitions to vacate the interlocutory decree contained allegations of fact which, if proved, would require the courts below to vacate the interlocutory decree, the courts below were guilty of irregular practice in deciding the factual points on limited affidavits and without giving petitioner the ordinary right to prove the allegations in said petitions in the usual way and to cross-examine the persons whose affidavits were used by respondents as well as certain accused respondents.

For example, the District Court found that the witnesses Guthard and Mayo did not intentionally testify falsely, despite their admissions to that effect in the suit brought by Dilling against them and others and despite the fact that petitioner was denied the opportunity of examining Guthard and Mayo on the basis of the newly discovered evidence showing the subterfuges by which they had successfully concealed Dilling. If petitioner had had an opportunity of examining Guthard and Mayo on the issues presented in our petition to open the decree, the finding by the District Court that they did not intentionally testify falsely would have been impossible.

Upon repeated assertion by respondents that the District Court did not proceed as above outlined, the reviewing courts may have been led to believe that the trial court did hear such evidence. Language similar to that used in respondents' last brief, as above quoted, is designed and probably did serve to convince the reviewing courts that after hearing the witnesses, the court made a finding adverse to petitioner. The trial court heard no evidence on

the issues presented by said petitions, not a single witness was permitted to testify on this subject, and the court specifically enjoined petitioner from introducing any testimony whatever on that subject. The Court of Appeals in its perfunctory review, as reflected in its one paragraph opinion, may have felt completely justified in relying upon similar statements by respondents.

The reports indicate that on Monday, April 28, 1947, the Supreme Court affirmed the case of *Champion Spark Plug Co.* v. *Sanders,* No. 680. The Court of Appeals for the Second Circuit in requiring one who repaired and re-conditioned spark plugs to indicate on the spark plug and package that they had been repaired, with the name of defendant prominently mentioned, applied a rule of morality for the marts of trade. The Court of Appeals said (156 F. (2d) 488, at page 492):

> "They have only to tell the truth, and the whole truth, and to tell it plainly."

How much more should this Court require rigid morality and truthfulness in pleadings, documentary evidence and testimony.

CONCLUSION.

The proceedings of the courts below were irregular. If justice is to be done, this Court must exercise its sacred prerogative in striking down the corrupt conduct of respondents and in repudiating the establishment of false principles of law, all as more fully set forth in the petition for certiorari and petition for rehearing filed herein.

We respectfully ask that the Court grant a rehearing of our petition for writ of certiorari and set aside its order

denying such petition and grant the prayer of the petition for writ of certiorari.

Respectfully submitted,

ERNST BUEHLER,
EDMUND D. ADCOCK,
RALPH M. SNYDER,
ELI E. FINK,
Attorneys for Petitioner, The Sanitary District of Chicago.

Certificate of Counsel.

The undersigned, one of the attorneys of record for the petitioner, The Sanitary District of Chicago, defendant in the above entitled cause, hereby certifies that the foregoing petition for rehearing is presented in all sincerity, and in good faith and not for delay.

RALPH M. SNYDER.